

In the United States Bankruptcy Court
for the
Southern District of Georgia
Waycross Division

In the matter of:

STEPHEN ARTHUR ELLISTON
LINDA LEE ELLISTON

Debtors

Chapter 7 Case

Number 91-50048

MEMORANDUM AND ORDER ON MOTION TO DISMISS
FILED BY THE UNITED STATES TRUSTEE

On June 4, 1991, a hearing was held upon a Motion to Dismiss Pursuant to 11 U.S.C. Section 707(b), or in the Alternative, Converting this Proceeding to a Case under Chapter 13 under 11 U.S.C. Section 706(a) if the Debtor so Requests filed by the United States Trustee. Upon consideration of the evidence adduced at that hearing, a review of the case file and the budgets filed by the Debtors, as well as the briefs submitted by the parties and applicable authorities I make the following Findings of Fact and Conclusions of Law.

FILED

at 10 O'clock & 18 min. A M

Date 7/17/91

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *JB*

FINDINGS OF FACT

Debtors filed a joint petition under Chapter 7 of the Bankruptcy Code with this Court on January 23, 1991. The Debtors' schedule of current income and expenses submitted with their Chapter 7 petition reflects a monthly gross income of \$5,477.51 with monthly take-home pay of \$3,473.07. This translates to a gross annual income of \$65,730.24 with an annual take-home pay of \$41,676.84, although the Debtor/husband testified that their combined 1989 income was \$65,166.46. The Debtors' schedules reflect expenses in the amount of \$3,531.00 per month. The Debtors' original schedule of current income and expenses was filed with the petition and executed on January 21, 1991. After the present Motion to Dismiss was filed, a revised schedule of current income and expenses was submitted on May 31, 1991, approximately four days before the hearing on this matter. The January summary of income and expenses shows a monthly deficit of \$57.93. The revised May schedule of income and expenses shows a monthly deficit of expenses over income of \$467.60. The total monthly expenses of the Debtor rose from \$3,500.31 in January to \$3,940.67 in May.

On March 13, 1991, a Consent Order was entered by this Court in which the Debtor consented to relief from stay for purposes of foreclosing upon

their principal residence. This had the effect eliminating a \$775.00 per month mortgage payment which was replaced by a \$650.00 per month rent payment on a three bedroom house in the May budget. Other changes between the January and May budget include the following: (1) Electricity was reduced by \$20.00 per month; (2) what was originally listed as a cable bill in the January budget was listed as "heat" in the May budget in the same amount of \$28.00; (3) water went up by \$6.00 per month; (4) telephone costs increased by \$5.00 per month; (5) the food budget increased from \$500.00 per month to \$700.00 per month; (6) clothing increased from \$60.00 per month to \$75.00 per month; (7) laundry and cleaning went from zero to \$15.00 per month; (8) newspapers, periodicals and books, including school books, went from zero to \$26.00 per month; (9) medical and drug expenses increased from \$35.00 per month to \$100.00 per month; (10) insurance not deducted from wages increased as follows: (a) auto insurance increased from \$144.00 per month to \$168.00 per month; (b) "other insurance" increased from \$80.00 per month to \$177.00 per month for a total insurance increase from \$224.00 per month to \$345.00 per month; (11) transportation, not including the auto payment, decreased from \$700.00 per month to \$250.00 per month; (12) recreation increased from \$125.00 per month to \$150.00 per month; (13) alimony, maintenance or support payments increased from \$260.00 to \$346.00 per month; and (14) other monthly payments were assumed as follows: Betty M. Lee - \$323.00 per month, BankSouth "for a refrigerator" - \$65.77

per month, Betty M. Lee "for a loan" - \$100.00 per month.

On cross-examination from the United States Trustee, Mrs. Elliston testified that she felt that the \$700.00 per month food budget was justified. She stated that they eat breakfast out every morning at approximately \$5.00 to \$6.00 per meal and that her husband eats out every day and never packs lunches because she feels that he is "entitled to eat out every day because he works hard." She further testified that she eats lunch out every day as well.

There were two items in the budget which represent payments to Betty Lee, the mother of Mrs. Elliston. The payment of \$323.00 per month represents payments on a debt for a 1990 Mazda 626 automobile for which the Debtors paid \$12,400.00 in April of 1991, approximately four months after filing Chapter 7 bankruptcy. Apparently Ms. Lee purchased the vehicle for them and they are making payments directly to her towards that purchase. The additional payment of \$100.00 per month to Betty Lee was on a pre-petition debt to her of approximately \$2,200.00, which represents \$1,500.00 paid over to Mr. Elliston's ex-wife's attorney and a \$700.00 personal loan. The Betty Lee pre-petition debt was not listed on the Debtors' A-3 Schedule of Unsecured Creditors Without Priority.

The Debtors' budget reflects \$26.00 for newspapers, periodicals and books, including school books. Mrs. Elliston testified that that budget entry reflects the true cost of some four periodicals which they receive on a daily basis, *The Blackshear Times*, *The Waycross Herald*, *The Florida Times Union*, and one other paper the name of which she could not recall. As to the \$75.00 per month budgeted for clothing, Mr. Elliston testified that his wife needs to dress well because she is a schoolteacher. Mr. Elliston is employed as a UPS driver and wears uniforms to work.

Although the Debtors are carrying medical insurance with an annual deductible of \$250.00 per person, \$100.00 per month was listed as medical and drug expenses. This represents an increase of \$65.00 per month over the January budget. When asked on cross-examination as to what the annual medical and drug bill truly was, Mr. Elliston stated that he did not know.

The revised May budget includes \$168.00 for auto insurance per month which reflects an increase of \$24.00 over the January premium. In addition, the May budget reflects \$177.00 for "other" insurance which reflects an increase of \$97.00 over the January budget.

The May budget reflects a \$250.00 per month transportation expense, not including the auto payment. This reflects a significant reduction from the \$700.00 per month transportation cost reported in the January budget. When questioned on cross-examination as to the validity of the \$250.00 expense, Mr. Elliston testified that the cost arose from the operation of the two new vehicles each of which are driven approximately 60 miles per day. In addition, there was some testimony that Mrs. Elliston will be pursuing a masters degree at Valdosta State University and anticipates a long commute. Mrs. Elliston testified that they travel on a monthly basis to Fernandina, Florida, to visit an elderly aunt.

The Debtors reflect \$150.00 in recreation expenses in the May budget which represents a \$25.00 per month increase over the January budget. When questioned as to the recreation budget, Mr. Elliston testified that the money was spent on movies, VCR rentals and dinners. When Mrs. Elliston was questioned by the Court as to whether she felt the \$150.00 per month for recreation was fair when she owes so much to unsecured creditors for psychological counseling for her son which has been of tremendous importance to her family she responded that she knows "doctors, lawyers, other people who have a lot of money - more than we do - and don't work as hard as we do and they go through bankruptcy with no problems. I don't understand why we have the problems here we do".

The Debtors' budget also reflects some \$100.00 for religious and other charitable contributions.

In addition to the budgetary problems, there are several omissions and questionable valuations on the Debtors' schedules. On Schedule B-2, personal property, the Debtors' list in Item (e) entitled "wearing apparel, jewelry, firearms, sports equipment and other personal possessions", the following:

Personal clothing and wearing apparel of debtors located at debtors' residence. No item having a value in excess of \$10.00.

\$51.00

This is broken down by separate attachment to reflect \$19.00 attributed to Mr. Elliston and \$32.00 attributed to Mrs. Elliston

The Debtors failed to list the ownership of a diamond wedding band worth approximately \$500.00, a .22 rifle and pistol worth approximately \$50.00, and other jewelry worth approximately \$30.00. The \$51.00 figure is somewhat questionable in that the January budget lists a monthly expenditure of \$60.00 of

clothing alone. On cross-examination, Mr. Elliston stated that they presently spend between \$75.00 and \$100.00 per month on clothing.

The Debtors failed to list a debt owed to BankSouth for a refrigerator purchased just prior to filing for which they owed approximately \$600.00 to \$700.00 with a monthly payment of \$65.00 over a two year period. The Debtors' schedule does reflect the ownership of a refrigerator as personal property with a value of \$50.00 but it is unclear whether that is the same refrigerator. The Debtors also failed to disclose the ownership of a lawnmower which they testified was worth approximately \$20.00.

The Debtors' schedules reflect a total secured debt of \$76,200.00, of which \$60,000.00 was secured by a home which has subsequently been foreclosed upon after a consent order was entered on a Motion for Relief from Stay on March 13, 1991, by this Court. In addition, and without counting any possible deficiency arising from the sale of the aforementioned home, there is in excess of \$49,439.00 in unsecured debt, not including a listed debt for "miscellaneous attorney's fees" in a "unknown" amount.

CONCLUSIONS OF LAW

The United States Trustee filed a Motion to Dismiss this Chapter 7 case pursuant to 11 U.S.C. Section 707(b) which provides:

After notice and a hearing, the court, on its own motion *or on a motion by the United States trustee, but not at the request or suggestion of any party in interest*, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

Section 707(b) was enacted by Congress to defeat abuses of Chapter 7 by consumer debtors who had the ability to pay their debts. The primary consideration in substantial abuse cases is whether the debtor has sufficient disposable income to repay a meaningful part of his debts or fund a Chapter 13 plan. In re Bell, 56 B.R. 637, 65 B.R. 575 (Bankr. C.D.Mich. 1986). In re Grant, 51 B.R. 385 (Bankr. N.D. Ohio 1985). This Court held In the matter of Strange, 85 B.R. 662 (Bankr. S.D.Ga. 1988) that a Chapter 7 case should be dismissed for substantial abuse where the debtor's income and expenses reflect an ability to pay and where the creditors would suffer an unfair financial loss if the Chapter 7 case

were to continue; the debtor in Strange had sufficient income, after deducting "all reasonable living expenses, to repay all her debts within a two year period." Strange, 85 B.R. at 664. The difficulty is in determining if a debtor has "sufficient disposable income" or could increase disposable income by reducing unnecessary and unreasonable expenses.

The Court in Grant, used the following three factors as a test for substantial abuse:

- 1) Debtor's ability to pay but refusal to pay a significant part of his debts under a Chapter 13 plan;
- 2) Debtor's bad faith by filing inaccurate schedules of needs and expenses or through maintaining a lifestyle beyond his financial means; and
- 3) Debtor's use of Chapter 7 for escaping prior excessive spending instead of for avoiding unforeseen situations.

Additionally newer cases on the substantial abuse issue mandate a "totality of the circumstances" test which includes an examination of the conditions which led to filing, debtor's post-petition spending and needs, the reasonableness of the family budget, misrepresentations by debtor concerning his true financial condition, and

debtor's good or bad faith. See In re Wilkes, 114 B.R. 551 (Bankr. W.D.Tenn. 1989); Matter of Dubberke, 119 B.R. 677 (Bankr. S.D.Iowa 1990).

Our first consideration should be Debtors' income and ability to pay. According to computations of Debtors' Schedule of Current Income, they have a monthly gross income of \$5,477.51 with monthly take-home pay of \$3,473.07. The Schedules showed expenses to be \$3,500.31 per month in January, leaving a significant deficit. The revised May schedule of income and expenses showed a deficit of \$467.60, with expenses rising to \$3,940.67 in May.

Of significance is the large increase in the amounts for certain budgeted items. The food budget increased from \$500.00 per month to \$700.00 per month for a family of two adults and one adult son. The Debtors' attributed the amount to their frequent habit of dining out at restaurants. Even though the Debtors may have difficult schedules requiring them to eat out regularly, a \$700.00 per month budget for three people is unreasonable and excessive. The Court deciding In re Stein, 91 B.R. 796 (Bankr. S.D. Ohio 1988) found a debtor's \$780.00 per month food budget for a family of five unreasonable and "excessive by local standards," Stein, 91 B.R. at 802. Although the Stein case involved a Chapter 13 confirmation issue instead of a Chapter 7 substantial abuse issue, the considerations

as to what constitutes an "unreasonable expense" are often the same.

Also, Debtors' expenditures were increased by \$323.00 per month in April, only four months after filing, when they purchased a \$12,400.00, 1990 automobile. Mrs. Elliston's mother financed the car, and the payments are made to her. Purchasing a fairly new automobile while in bankruptcy does not show a significant effort to reduce expenses. As the Court stated in Matter of Webb, 75 B.R. 265 (Bankr. M.D.Tenn. 1986), "the purpose of debtor rehabilitation is disserved if the bankruptcy courts must be used in order to afford a basis for making their creditors pay for their luxuries and gifts." Although purchasing a car may have been necessary, the Debtors were acting in bad faith to obligate themselves for such large additional payments post-petition. Other expenses which seem excessive are the recreation expenses, which increased from \$125.00 as originally budgeted to \$150.00 per month.

Another consideration relevant to the substantial abuse issue is Debtors' failure to list certain debts and assets on their Schedules. As stated earlier in the totality of the circumstances test, any misrepresentations, and here certainly omissions, regarding Debtors' true financial condition are to be considered. Here, the Debtors failed to list a \$700.00 pre-petition unsecured debt to Mrs. Elliston's

mother. Also, assets including a \$500.00 wedding band, a rifle, and a pistol were not listed in the Debtors' schedules. Because of the Debtors' failure to list these and possibly other debts and assets, the Debtors' financial condition was not adequately represented in the Schedules.

Besides bearing on the substantial abuse issue, the Debtors' failure to list the above debts and assets brings them within the bar to discharge provisions of Section 727. The Debtors did make a false oath or account by not listing the assets and debts on the Schedules, but the issue is whether they did so knowingly and fraudulently under Section 727(a)(4). According to the Eleventh Circuit Court of Appeals deciding In re Chalik, 748 F.2d 616 (1984), a debtor's knowing and fraudulent omission of assets or information necessary to determine his financial condition is sufficient to bar a discharge under Section 727. All assets are to be listed even if some assets are believed to be "valueless at the time". Chalik, 748 F.2d 616 (1984).

The purpose of Section 727, and particularly Section 727(a)(4), is to insure that the debtor provides complete and reliable information for all who may need to read his statements or schedules. Great Southern Sav. Bank v. Harmon (Matter of Harmon), Ch. 7 Case No. 89-40101, Adv. No. 89-4036 (Bankr. S.D.Ga.

Nov. 28, 1989). See In re Seablom, 45 B.R. 445 (Bankr. N.D. 1984). When debtor makes an honest mistake concerning his statements or schedules, a discharge will not be denied. See In re Cycle Accounting Services, 43 B.R. 264 (Bankr. Texas, 1984). Generally the burden of proof for intent, knowledge, or fraud is upon the plaintiff, here the trustee. The burden of coming forward with additional evidence shifts to the debtor once plaintiff presents substantial evidence of intent or knowledge. See In re Martin, 698 F.2d 883 (11th Cir. 1983).

Here, the trustee showed that debtors failed to list the debt owed to the mother-in-law, of which the debtors must have been aware. This failure was not explained. The Debtor was aware that she should have listed her wedding band, even if it was not worth very much. She explained that it had mere sentimental value, but she should have realized that it would be valuable if sold. Also, the Debtors knew they should have listed their rifle and pistol since these were valuable items. The Debtors claimed that they were ignorant about the value of the ring and their failure to list these debts and assets. They also claimed that they relied upon their attorney when preparing the list of their debts and assets, however, the Debtors are responsible for filing accurate lists and schedules with the Court.

The Trustee met his burden of showing some evidence of knowledge or bad intent. The Debtors failed to rebut the Trustee's showing of knowledge. Despite their claims of ignorance, the Debtors' intent and knowledge were shown from their other words and actions, their courtroom behavior, and their failure to adequately explain the discrepancies in the Schedules. Consequently, the Debtors might well have been denied a discharge under Section 727.

Also noteworthy in assessing the totality of circumstances is the wife's comment that many doctors, lawyers, and wealthier people go through bankruptcy without problems and that she could not understand why they were having difficulties with their Chapter 7 case. It is unfortunate that the bankruptcy courts are viewed as an easy way out of financial problems, but Congress has attempted to respond to that perception by its enactment of Section 707(b). To attempt to defend an abuse of the provisions of Title 11 by asserting that others have done likewise is clearly not a legal defense. Debtors are, compared to the vast majority of debtors in this Court, high income individuals, who have made no effort to reduce their expenditures, whose schedules contained material inaccuracies, and who may be supporting persons not their legal dependents in preference to paying creditors.

Given the Debtors' apparent ability to fund a Chapter 13 plan, their excessive budget amounts and expenditures, and failure to list certain debts and assets on the appropriate schedules, this Chapter 7 case should be dismissed.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the within Chapter 7 case be, and the same is, hereby dismissed as a "substantial abuse" of Chapter 7 within the meaning of Section 707(b) of the Bankruptcy Code.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 15th day of July, 1991.